(1)

Supreme Court, U.S.
FILED

No. 001137 DEC 27 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MIHN VAN BUI,

Petitioner,

v.

FRANCISCO ALARCON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS LUNDY, State Bar #57656
Counsel of Record
2500 Vallejo Street, Suite 200
Santa Rosa, California 95405
(707) 524-8112

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

41pp

QUESTIONS PRESENTED

I.

Is it unconstitutional to convict a person of aggravated kidnapping based on evidence that would *not* have been legally sufficient to convict him of the lesser included offense of simple kidnapping?

II.

To what extent must a federal court give deference to the agreement of the parties (one of whom is the State Attorney General) as to the construction of state law?

III.

Does due process require a federal appellate court to give a litigant notice before failing to follow the parties' agreement as to the construction of the applicable state law?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, MIHN VAN BUI, and Respondent, THE STATE OF CALIFORNIA and FRANCISCO ALARCON, in his capacity as Director of the CALIFORNIA DEPARTMENT OF CORRECTIONS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Facts	2
B. Summary of the Claim	2
C. Appellant's Opening Brief	3
D. Respondent's Brief	4
E. Appellant's Reply Brief	4
F. The Appellate Decision	5
REASONS FOR GRANTING CERTIORARI	5
A. The Federal Appellate Decision Conflicts With California Law (Rule 10(a))	5
B. The Ninth Circuit So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power (Rule 10(a))	6
NECESSITY FOR REHEARING	7
A. Conflict Between The Ninth Circuit Opinion And The California Supreme Court (Rule 10(a))	7

TABLE OF CONTENTS – Continued

Page

1. The Ninth Circuit Held That Simple Kidnapping Is Not A Lesser Included Offense Of Kidnapping For Robbery 7

2. The California Supreme Court Holds That Simple Kidnapping Is A Lesser Included Offense Of Aggravated Kidnapping 8

B. Whether The Principles Of Comity And Deference Should Apply When The State Attorney General And A Petitioner On Habeas Corpus Agree As To The Construction Of State Law 10

C. Need To Assure The Fairness Of The Appellate Process 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Advani Enterprises, Inc. v. Underwriters at Lloyds, 140 F.3d 157 (2nd Cir. 1998) 12

Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450 (1962) 9

Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942) 9

Cole v. Arkansas, 333 U.S. 196 (1948) 12

Conde v. Henry, 198 F.3d 734 (9th Cir. 1999) 3

Cox v. McCarthy, 829 F.2d 800 (9th Cir. 1987) 12

Estelle v. McGuire, 502 U.S. 62 (1991) 10

In re Crumpton, 9 Cal.3d 463 (1973) 9

Marino v. Ragen, 332 U.S. 561 (1947) 11

People v. Adams, 4 Cal.4th 429 (1971) 8

People v. Anderson, 15 Cal.3d 806 (1975) 7

People v. Bigelow, 37 Cal.3d 731 (1984) 8

People v. Daniels, 459 P.2d 225 (1969) 9

People v. Davis, 191 Cal.App.3d 1365 (1984) 4, 10

People v. Green, 27 Cal.3d 1 (1980) 3, 8

People v. Jackson, 66 Cal.App.4th 182 (1998) 4, 10

People v. Killean, 4 Cal.3d 423 (1971) 9

People v. Lohbauer, 29 Cal.3d 364 (1981) 8

People v. Martinez, 20 Cal.4th 225 (1999) 3, 5

People v. Smith, 4 Cal.3d 426 (1971) 9

TABLE OF AUTHORITIES – Continued

Page

People v. Stanworth, 11 Cal.3d 588 (1974) 9

People v. Teale, 70 Cal.2d 497 (1969) 8

People v. Williams, 2 Cal.3d 894 (1970) 9

Phyle v. Duffy, 334 U.S. 431 (1948) 11

Schmuck v. United States, 489 U.S. 705 (1989) 8

Wainwright v. Goode, 464 U.S. 78 (1983) 10

STATUTES

California Penal Code § 207 ..... *passim*

§ 209 ..... *passim*

28 U.S.C. § 1257 1

U.S. Constitution, 14th Amendment 1

California Rules of Court, Rule 10(a) 5, 6, 7, 10

MISCELLANEOUS

Publication, *Mandatory Criminal Jury Instruction Handbook* (1999 Ed.) Official publication of the California Center for Judicial Education and Research, a joint enterprise of the California Judges Association and the Judicial Council of California 3

PETITION FOR WRIT OF CERTIORARI

Mihn Van Bui hereby petitions for a writ of certiorari to the Ninth Circuit Federal Court of Appeal to review its order denying his habeas corpus petition.

OPINIONS BELOW

The Opinion of the Ninth Circuit Federal Court of Appeal affirming the judgment and denying the Petition for Writ of Habeas Corpus filed on August 21, 2000, is attached hereto as Appendix "A."

The Order of the Ninth Circuit Federal Court of Appeal denying the Petition for Rehearing filed on September 29, 2000, is attached hereto as Appendix "B."

JURISDICTION

Mr. Bui respectfully invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14:

> "No State shall make or enforce any law which shall . . . deprive a person of life, liberty or property without due process of law. . . . "

STATEMENT OF THE CASE

A. Facts

"In this case, the evidence established that the victim came home to find Bui and others in the midst of a house invasion robbery. The victim immediately turned and fled from inside the front door into the front yard. Bui pursued and captured the victim, who fell to the ground after 3 to 5 steps. Bui dragged the victim back into the house, holding her by the hair. He held a gun in his hand. Once inside the house, Bui lead the victim from room to room, repeatedly demanding that she disclose the location of any money or jewelry within the home." *Opinion, p. 3.*

B. Summary of the Claim

The facts described in Section A above would, without question, have been legally insufficient to convict Mr. Bui of PC 207 simple kidnapping. Nevertheless, Mr. Bui was convicted of PC 209 kidnapping for robbery and sentenced to life imprisonment based on these very same facts. Mr. Bui challenged the sufficiency of the 3-5 steps[1] to support the kidnapping for robbery conviction based on the following syllogism:

---

[1] In state court the movement from room to room inside the house was held insufficient to support the kidnapping for robbery charge. *Excerpt of Record 89-91.* Therefore, the kidnapping for robbery conviction was based entirely on the movement of 3-5 steps.

1. PC 207 simple kidnapping is a lesser included, and hence, a necessary element of PC 209 kidnapping for robbery. *AOB 14-16.*

2. The evidence was insufficient as a matter of law to convict of PC 207 simple kidnapping. *AOB 13-14; ARB 2-4.*

3. Therefore, the evidence was also insufficient to convict of PC 209 kidnapping for robbery. *AOB 16-18; ARB 5.*[2]

C. Appellant's Opening Brief[3]

Mr. Bui cited numerous California Supreme Court cases, California Appellate Court cases and a Ninth Circuit case (*Conde v. Henry*, 198 F.3d 734, 739-40 (9th Cir. 1999)), all of which concluded that under California law PC 207 simple kidnapping is a lesser included of PC 209 kidnapping for robbery. *AOB 14-16.*

Mr. Bui also cited, to the same effect, the *Mandatory Criminal Jury Instruction Handbook* (1999 Ed.) which is the official publication of the California Center for Judicial Education and Research, a joint enterprise of the California Judges Association and the Judicial Council of California. *AOB 15.*

---

[2] Under the applicable California law, actual distance was "the sole criterion" for assessing whether the asportation was sufficient to prove simple kidnapping. See *People v. Martinez*, 20 Cal.4th 225 at 234 (1999). Under this rule, a reviewing court would have been "compelled to reverse" for actual distance far in excess of the 3-5 steps in the present case. *Id.* at 239; see also, *e.g., People v. Green*, 27 Cal.3d 1, 67 (1980) [90 feet is legally insufficient for simple kidnapping].

[3] Hereinafter "AOB."

Mr. Bui also cited cases in which the California Attorney General had conceded this issue.[4]

D. Respondent's Brief[5]

The California Attorney General conceded that under California law PC 207 simple kidnapping is a lesser included of PC 209 kidnapping for robbery and that if the evidence was insufficient for simple kidnapping then it would also be insufficient for kidnapping to commit robbery. *RB 5.*

However, the Attorney General contended that the evidence was sufficient to convict of PC 207 simple kidnapping because factors other than the actual distance of asportation could be considered. *RB 6; see also RB 9-11.*

E. Appellant's Reply Brief[6]

In his reply brief Mr. Bui focused on the *only* issue contested by the Attorney General: whether the evidence of simple kidnapping was sufficient? In this regard Appellant's Reply Brief (pages 2-4) demonstrated that as to simple kidnapping:

---

[4] *See People v. Jackson*, 66 Cal.App.4th 182, 189 (1998) ["the People concede that kidnapping is a lesser included within the offense[ ] of kidnapping to commit robbery. . . . "]; *People v. Davis*, 191 Cal.App.3d 1365, 1368 (1984) [Attorney General concedes that "simple kidnapping is a lesser included offense of kidnapping for the purpose of robbery. . . . "].

[5] Hereinafter "RB."

[6] Hereinafter "ARB."

1) only actual distance could be considered in reviewing the sufficiency of asportation (see *Martinez, supra,* 20 Cal.4th at 234), and

2) an actual distance of 3-5 steps is insufficient as a matter of law. *See Martinez, supra,* 20 Cal.4th at 239.

F. The Appellate Decision

The Ninth Circuit appellate panel ignored Mr. Bui's syllogism and the Attorney General's concession. Instead, the panel concluded that because Mr. Bui was convicted of PC 209 kidnapping for robbery, it did not matter that the evidence was insufficient to convict him of PC 207 simple kidnapping. *Opinion, pp. 2-3.*[7] The unstated but essential assumption underlying this conclusion was that PC 207 simple kidnapping was neither an element nor lesser included offense of PC 209 kidnapping for robbery. *See pp. 8-9, below.*

REASONS FOR GRANTING CERTIORARI

A. The Federal Appellate Decision Conflicts With California Law (Rule 10(a))

The Ninth Circuit Court of Appeal's decision condemns Mr. Bui to life imprisonment for a conviction of

[7] The panel cited two California Supreme Court cases and two intermediate appellate cases. *Opinion pp. 3-4.* However, none of these cases directly addressed the lesser included offense issue raised by Mr. Bui.

kidnapping for robbery (Cal. Penal Code § 209 (hereinafter PC 209)) based on evidence that would have been legally insufficient to convict him of the lesser included offense of simple kidnapping (Cal. Penal Code § 207 (hereinafter PC 207)). This result conflicts with California law as expressed by the California Supreme Court and as conceded by the California Attorney General in this and other cases. Thus, Certiorari is necessary and appropriate under Rule 10(a).

B. The Ninth Circuit So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power (Rule 10(a))

Mr. Bui contended that the evidence was legally insufficient to convict of the lesser included offense of PC 207 simple kidnapping and, therefore, it was also insufficient to convict him of PC 209 kidnapping for robbery.

The parties on appeal agreed that PC 207 simple kidnapping is a lesser included offense of PC 209 aggravated kidnapping under California law. Therefore, the only disputed issue was whether or not the evidence of PC 207 simple kidnapping was legally sufficient. However, the Ninth Circuit *never* addressed this issue. Instead, the Ninth Circuit declined to accept the parties' agreement that simple kidnapping is a lesser included of aggravated kidnapping, and affirmed the conviction without ever addressing the sufficiency of the evidence to prove simple kidnapping. Furthermore, the Ninth Circuit Panel removed the case from the oral argument calendar thus depriving Mr. Bui of any notice of, or opportunity to,

address the panel's decision not to accept the concession of the California Attorney General.

This unfair lack of notice and extraordinary refusal to accept, or at least give deference to, the concession of a state's Attorney General as to the construction of the state's law is a radical departure from the accepted and usual course of judicial proceedings. *Rule 10(a).*

Therefore, this Court should exercise its supervisory power to afford Mr. Bui full and fair appellate review of his claim.

NECESSITY FOR REHEARING

A. Conflict Between The Ninth Circuit Opinion And The California Supreme Court (Rule 10(a))

1. The Ninth Circuit Held That Simple Kidnapping Is Not A Lesser Included Offense Of Kidnapping For Robbery

The unstated but essential linchpin of the panel's opinion is that simple kidnapping under PC 207 is not a lesser included offense of kidnapping for robbery under PC 209. Had the panel accepted Mr. Bui's contention (and the Attorney General's concession) that PC 207 kidnapping is a lesser included of PC 209 kidnapping for robbery, then the panel would have been required to consider the sufficiency of the evidence to support a PC 207 conviction because "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." (Internal citations and quote marks omitted.) *People v. Anderson,* 15 Cal.3d 806,

809-10 (1975); see also *People v. Lohbauer*, 29 Cal.3d 364, 369 (1981); *Schmuck v. United States*, 489 U.S. 705 (1989) [a lesser included is a "subset" of the greater].

Hence, by rejecting Mr. Bui's claim on the sole basis that he was convicted of violating PC 209 and not PC 207, the panel necessarily held that PC 207 is neither a lesser included nor an element of PC 209. *Opinion, p. 2.*

2. The California Supreme Court Holds That Simple Kidnapping Is A Lesser Included Offense Of Aggravated Kidnapping

The California Supreme Court has expressly recognized that PC 207 kidnapping is a lesser included of PC 209 kidnapping for robbery. *See, e.g., People v. Bigelow*, 37 Cal.3d 731, 755 (1984); *People v. Green*, 7 Cal.3d 1, 68 (1980) [the jury found "defendant guilty of the lesser included offense of kidnapping set forth in section 207"]; *People v. Teale*, 70 Cal.2d 497, 501 (1969) [defendants were "found guilty of . . . simple kidnapping (a lesser included within the offense charged [209 kidnapping to commit robbery"]).]

The panel relied on two California Court of Appeal cases "with facts similar to this one" in concluding that the evidence was sufficient to support a conviction under PC 209 because the victim was removed from public view. *Opinion, p. 4.*

However, the panel ignored California Supreme Court cases whose facts and holdings directly conflict with the cases cited by the panel. *See People v. Adams*, 4 Cal.4th 429 (1971) [victims moved from public portion of

liquor store to a rear storage area]; *People v. Smith*, 4 Cal.3d 426 (1971) [hotel desk clerk compelled to go upstairs to a second-floor room]; *People v. Killean*, 4 Cal.3d 423 (1971) [victims accosted outside their apartment and moved inside]; and *People v. Williams*, 2 Cal.3d 894 (1970) [victim moved from open area of service station into restroom]. "In each of these cases the movement diminished the likelihood of public observation of any physical assault on the victim. Yet in each we concluded that the risk of harm inherent in the underlying crime had not been substantially increased within the meaning of *Daniels*." *In re Crumpton*, 9 Cal.3d 463, 467 (1973) [moving victim behind truck and out of public view not sufficient]; see also *People v. Stanworth*, 11 Cal.3d 588 (1974) [victim dragged from open road into a nearby field]. Based on this authority the California Supreme Court has made it clear that "acts of removing the victim from public view do not in themselves substantially increase the risk of harm within our rule in *Daniels*." *In re Crumpton, supra*, 9 Cal.3d at 467.

In the face of these Supreme Court holdings which directly conflict with the cases cited by the panel, the panel's decision raises troubling comity issues because, under California law, the appellate court opinions relied upon by the panel are not valid precedent. *See Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962). Mr. Bui contends that a federal court is not permitted to construe state judicial opinions in a manner that is of dubious validity when one considers the entire body of judicial precedent from the state's highest court – see *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 497 (1942) [federal court in determining state law should look

to "the whole law of that state," rather than "scattered opinions of an intermediate appellate court"] – particularly when one also considers the concession of the state's "highest non-judicial legal officer."

In sum, because the decision of the Ninth Circuit conflicts with firmly established California Supreme Court precedent, certiorari should be granted under Rule 10(a).

B. Whether The Principles Of Comity And Deference Should Apply When The State Attorney General And A Petitioner On Habeas Corpus Agree As To The Construction Of State Law

The general rules of comity and deference to state law are well established. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). However, the cases provide little guidance as to how a federal appellate panel should treat the parties' agreement regarding construction of the relevant state law.[8]

---

[8] The California Attorney General agreed with Mr. Bui's contention that PC 207 kidnapping is a lesser included of PC 209 kidnapping. *See p. 6, above.* Moreover, the Attorney General made similar concessions in other cases. *See People v. Jackson*, 66 Cal.App.4th 182, 189 (1998) ["the People concede that kidnapping is a lesser included within the offense[ ] of kidnapping to commit robbery. . . . "]; *People v. Davis*, 191 Cal.App.3d 1365, 1368 (1984) [Attorney General concedes that "simple kidnapping is a lesser included offense of kidnapping for the purpose of robbery. . . . "].)

Should the federal court on habeas corpus be required to give consideration and/or deference to such agreement between the parties? Should the federal court on habeas corpus be required to give consideration and/or deference to such an agreement when one of the parties is the State's highest non-judicial legal officer? *Phyle v. Duffy*, 334 U.S. 431, 441 (1948). Or, should the federal court on habeas corpus have unfettered discretion to reach its own contrary conclusions as to the construction of state law without even addressing the parties' agreement to the contrary?

Mr. Bui contends that the State Attorney General's concession should be either dispositive, or given great weight. *See Marino v. Ragen*, 332 U.S. 561, 562 (1947) per curiam [accepting as dispositive concession of State Attorney General on issue of state law, which required reversal of conviction]; *cf. Phyle v. Duffy, supra*, 334 U.S. at 441 [giving "great weight" to pronouncement of California Attorney General, in absence of controlling state statutes and court decisions]. The panel opinion held to the contrary because it didn't even mention the Attorney General's concession, let alone discuss it, even though Mr. Bui pointed it out and relied on it in his briefing. *ARB 1-2*. The panel also ignored Mr. Bui's request that the matter be addressed on rehearing. *See Appendix B, hereto.*

Therefore, certiorari should be granted to clarify this important issue of federal habeas corpus jurisprudence.

C. Need To Assure The Fairness Of The Appellate Process

The panel's opinion visited a fundamental unfairness on Mr. Bui and his counsel for two reasons.

First, in light of the Attorney General's concession that PC 207 kidnapping is included in PC 209 kidnapping, Mr. Bui's reply brief was primarily devoted to the issue as joined by the Attorney General: Whether there was sufficient evidence of PC 207 kidnapping?

Second, the appellate panel unilaterally removed the case from the oral argument calendar. Hence, counsel was never given notice of, nor an opportunity to address, the panel's intention to resolve the appeal in reliance on an issue that Mr. Bui's opponent did not contest.

Fundamental fairness and appellate due process (see, generally, *Cole v. Arkansas*, 333 U.S. 196, 201-02 (1948)) require that counsel be given notice before submission of the case if the panel is considering not accepting the parties' joinder of the issues. *Compare, Advani Enterprises, Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160 (2nd Cir. 1998) [court requested supplemental briefing before addressing an issue which the parties did not raise]; *Cox v. McCarthy*, 829 F.2d 800, 802 (9th Cir. 1987) [same].

CONCLUSION

Mr. Bui respectfully asserts that certiorari should be granted in this case to address the questions presented and to provide Mr. Bui with appellate review of his claims that comport with fundamental principles of fairness.

Dated: 1-8-01

Respectfully submitted,

THOMAS LUNDY, State Bar #57656
2500 Vallejo Street, Suite 200
Santa Rosa, California 95405
(707) 524-8112

Counsel of Record for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIHN VAN BUI, Petitioner-Appellant, v. FRANCISCO ALARCON, Respondent-Appellee.	No. 99-16139 D.C. No. CV-F-96-5107- AWI/SMS-P MEMORANDUM[1] (Filed Aug. 21, 2000)

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted Aug. 10, 2000.[2]
San Francisco, California

Before: THOMPSON, T. G. NELSON, and SILVERMAN, Circuit Judges.

Petitioner Mihn Van Bui challenges his conviction for kidnapping to commit robbery under California Penal Code section 209(b)(1). We have jurisdiction pursuant to

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a).

28 U.S.C. § 2254, and we affirm the district court's denial of Bui's petition.[3]

The parties are familiar with the facts on appeal; thus, we need not recite the facts here except as necessary for the disposition of the issues.

Bui argues that there was insufficient evidence to convict him of aggravated kidnapping (kidnapping for robbery). "A state prisoner may . . . be entitled to federal habeas relief if he can show that the evidence adduced at trial was such that no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Martineau v. Angelone*, 25 F.3d 734, 738 (9th Cir. 1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

Specifically, Bui argues that the evidence is insufficient to convict him of kidnapping for robbery, because, he alleges, it would be insufficient to convict him of *simple* kidnapping under California Penal Code section 207(a). Because simple kidnapping is a lesser offense included within kidnapping for robbery, Bui contends that kidnapping for robbery requires no less asportation than does simple kidnapping.

---

[3] Although Bui's federal petition was filed prior to the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), his notice of appeal was filed after AEDPA's effective date. However, Bui did not request a Certificate of Appealability ("COA"). Consistent with the Supreme Court's recent opinion in *Slack v. McDaniel*, ___ U.S. ___, ___, 120 S. Ct. 1595, 1603 (2000), we treat Bui's notice of appeal as an application for a COA. *See Schell v. Witek*, No. 97-56197, 2000 WL 943504, at *2 n. 4 (9th Cir. July 11, 2000). We grant the COA and exercise jurisdiction over the issue raised on appeal.

This contention is without merit. Bui was not convicted of simple kidnapping under section 207(a); he was convicted of aggravated kidnapping (kidnapping for robbery) under section 209(b)(1). Under California law, kidnapping for robbery requires movement of the victim that (1) is not merely incidental to the commission of the robbery and (2) substantially increases the risk of harm to the victim. *See People v. Rayford*, 884 P.2d 1369, 1382-83 (Cal. 1994); *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969). The California Supreme Court has held that "there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong." *Rayford*, 884 P.2d at 1374.

In this case, the evidence established that the victim came home to find Bui and others in the midst of a house invasion robbery. The victim immediately turned and fled from inside the front door into the front yard. Bui pursued and captured the victim, who fell to the ground after 3 to 5 steps. Bui dragged the victim back into the house, holding her by the hair. He held a gun in his hand. Once inside the house, Bui lead the victim from room to room, repeatedly demanding that she disclose the location of any money or jewelry within the home. Given these facts, a rational trier of fact could have concluded that the movement of the victim to the secluded interior of the house was not "merely incidental" and that it substantially increased the risk of harm to the victim.

We note that in kidnapping for robbery cases with facts similar to this one, California courts have found the evidence sufficient to support a conviction under section 209(b)(1). *See, e.g., People v. Ellis*, 15 Cal.App.3d 66, 72 (1971) (affirming conviction under section 209(b)(1)

where victims, as they were about to enter their apartment building, were taken inside their apartment residences and robbed); *People v. Thomas*, 3 Cal.App.3d 859, 865 (1971) (affirming conviction under section 209(b)(1) where defendant forced two women at gun point from a well-lighted street into a nearby darkened alley because "the girls were forced into a place where the probability of rescue was lessened, and the likelihood of violence against them heightened since [the defendant] could reasonably believe it would go undetected."). Federal courts must defer to the judgment of a state court on interpretations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Accordingly, the district court's denial of Bui's petition is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIHN VAN BUI, Petitioner-Appellant, v. FRANCISCO ALARCON, Respondent-Appellee.	No. 99-16139 DC# CV-F-96-5107-AWI/SMS-P Eastern District of California ORDER (Filed Sep. 29, 2000)

Before: THOMPSON, T.G. NELSON, and SILVERMAN, Circuit Judges:

The panel has voted to deny appellant's or appellee's petition for rehearing and voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MIHN VAN BUI, Petitioner, v. FRANCISCO ALARCON, Respondent.	CIV F 96 5107 AWI SMS P REPORT AND RECOMMENDATION RE: PETITION FOR WRIT OF HABEAS CORPUS

BACKGROUND
(Filed Nov. 29, 1998)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On May 5, 1992, a jury convicted petitioner of one violation of California Penal Code § 209(b) (kidnaping to commit robbery); one violation of California Penal Code § 460 (burglary); two violations of California Penal Code § 212.5 (residential robbery); one violation of California Penal Code § 602.5 (trespass), a lesser related offense of residential robbery; three violations of California Penal Code § 245(a)(2) (assault with a deadly weapon); three violations of California Penal Code § 236 (false imprisonment); and one violation of California Penal Code § 182(a)(1) (conspiracy to commit robbery). The jury also found true and enhancement allegation that

petitioner had used a firearm within the meaning of California Penal Code § 12022.5.

On October 13, 1992, the trial court committed petitioner to the California Youth Authority.[1] On January 26, 1993, petitioner was sentenced because he was no longer eligible under California Welfare and Institutions Code § 1731.4 for commitment to the California Youth Authority. The trial court sentenced petitioner to life with the possibility of parole for the kidnaping conviction plus an additional four years for the firearm enhancement. Petitioner was also sentenced to the middle term for the two robbery convictions. All other sentences were stayed.[2]

Petitioner timely appealed his conviction. On November 9, 1994, the California Court of Appeal denied petitioner's appeal. On December 8, 1994, the California Court of Appeal denied petitioner's request for rehearing.

Petitioner then filed a petition for review in the California Supreme Court. On February 15, 1995, the California Supreme Court denied the petition for review.

On February 6, 1996, petitioner filed a federal petition for writ of habeas corpus in this Court. The petition contained four grounds for relief: (1) there was insufficient evidence to support the kidnaping to commit robbery conviction; (2) trial counsel erred by conceding

---

[1] Petitioner was tried as an adult. However, he was only seventeen when he was convicted.

[2] It appears petitioner is being housed at a facility run by the California Youth Authority.

petitioner's guilt in closing arguments; (3) petitioner's trial counsel was ineffective; and (4) prosecutorial misconduct.

After being ordered by the Court to respond, on July 17, 1997, respondent filed an answer. Respondent contended that claim (2), claim (3), and claim (4) had never been presented to the California Supreme Court. Respondent also addressed the merits of the insufficiency of the evidence claim.

On October 15, 1997, petitioner filed a traverse. Petitioner argued that claim (2) has been present to the California Supreme Court and is exhausted. Petitioner also replied to respondent's arguments concerning whether there was sufficient evidence to support the kidnaping conviction.

On December 18, 1997, the Court filed findings and recommendations. The Court concluded that only the sufficiency of the evidence claim was exhausted. Because the petition was a mixed petition, the Court recommended that the petition be dismissed.

On January 20, 1998, petitioner filed objections to the finds and recommendations. Petitioner contended that his claims were exhausted. However, if the Court found the petition contained unexhausted claims, petitioner requested that the Court allow him to remove the unexhausted claims and hold his petition in abeyance while he exhausted his state remedies.

On February 2, 1998, respondent filed a reply to petitioner's objections.

On September 10, 1998, the Court adopted the findings and recommendations. The Court informed petitioner that he must voluntarily dismiss his unexhausted claims so that the Court could proceed on the exhausted claim or the Court would dismiss the entire petition. The Court declined to hold the petition, containing the exhausted claim, in abeyance while petitioner presented the unexhausted claims to the California Supreme Court.

On October 2, 1998, petitioner filed a dismissal of the unexhausted claims and requested that the Court proceed to the merits of the insufficiency of the evidence claim.

FACTS

In December 1991 several individuals were living at the home of Chow Van (Linda) Ling and her husband located at 421 West Church Avenue in Ridgecrest, California. Ka Luen (Karen) Shum, Ms. Ling's niece, and Louisa Suen, Ms. Ling's daughter, lived in the house. In addition, a cook at a restaurant Ms. Ling and her husband owned and another employee were living in the house.

Ms. Shum was a college student and was in the house on December 17, 1991 at approximately 1:30 p.m. Ms. Shum was sitting on the couch in the "sitting room" watching television when she heard the dogs begin to bark. Ms. Shum looked up and saw petitioner come from the kitchen carrying a gun. Ms. Shum was ordered to lie down on the floor. Petitioner removed Ms. Shum's bracelet, and then Ms. Shum's hands and feet were bound with duck tape. Ms. Shum realized that a total of four

strangers were in the house – Petitioner, Kan Wood Yung, Thu Ho, and Mindy Dao, also known as Dieu Quach.

A towel was eventually thrown over Ms. Shum's face. While Ms. Shum was restrained on the floor, petitioner asked her if anyone else would be coming home. Ms Shum told him that Louisa would be home at 2:00 p.m. and asked petitioner not to scare her. Petitioner told Ms. Shum to "shut her fucking mouth."

Ms. Shum was asked what room was usually kept locked. Ms. Shum was also asked which room was the boss's room. Ms. Shum assumed that "the boss" referred to Ms. Ling's husband because he owned a restaurant. Ms. Shum heard the four strangers going through the house and heard the two female robbers in Ms. Ling's room happy because they had found jewelry.

About half an hour after petitioner and the other defendants had entered the house, Ms. Ling came home. Ms. Ling attempted to enter the house through the front door. However, Ms. Ling was unable to open the door because something was jamming the door. Ms. Ling managed to slightly open the door. Ms. Ling saw people she did not know in the house and saw petitioner holding a gun. Ms. Ling was told to come into the house. At this, Ms. Ling turned and ran into the yard. She had only taken three or four steps before she fell. Petitioner came out of the house, pointed a gun at Ms. Ling, and ordered her to get into the house. Petitioner then pulled Ms. Ling's hair and dragged her back into the house.

Ms. Ling was taken into the sitting room where her jewelry was removed and she was asked where there was money. Petitioner then moved Ms. Ling throughout the

house asking her where the money was located while the other defendants looked around the house. It appears petitioner still had the gun. Eventually, Ms. Ling was taken to her bedroom and bound with duct tape. Petitioner and defendant Yung spoke in English and Vietnamese, languages Ms. Ling did not understand.

About this time, the students at St. Ann's, which is located across the street from the house, were let out of school. Louisa, Monica Robertson, Martha Rosales, Brittany Foust, and Monique Robertson were all students at St. Ann's and were standing outside of the school when Ms. Ling drove up. Monica saw Ms. Ling walk toward the house but did not see anything else.

Soon after, Louisa, Monica, Martha, Brittany, and Monique walked across the street to the house. The girls were planning to study at the house. Louisa tried to open the front door, but it would not open. The girls yelled at Ms. Ling to let them in, but no one answered. It appears Louisa also tried to open the door with her key, but it did not work. Eventually, the girls went around to the back of the house.

The girls found a woman none of them had seen before standing by the back door. All of the girls went inside the house, but petitioner soon appeared and ordered all of the girls except for Louisa out of the house. Louisa went into the sitting room where she saw Ms. Shum with a towel over her head. Louisa was taken to Ms. Ling's room where defendant Yung bound her with duck tape. Petitioner told Louisa to be quiet. It appears someone also told Louisa that her father had lost money.

Defendant Ho and defendant Dao were told to go outside and pretend that they were looking for a dog because the girls might go back to the school and call the police. Meanwhile, the girls had told July Lee Foust what had happened. Defendant Dao and defendant Ho approached Ms. Foust and the girls and said that they were looking for a dog and two hamsters. They also told the group that their brother was "cuckoo." Defendant Dao and defendant Ho eventually returned to the house.

The girls reported the entire incident to their teacher and then to their principal, Patricia Bailey. Ms. Bailey called the house and asked for Louisa. She was told Louisa was busy. Ms. Bailey then called the police.

Meanwhile, back at the house, Ms. Shum was untied and taken to Ms. Ling's room. Ms. Ling and Louisa were still bound on the bed. Ms. Shum was again bound with duck tape. After a few minutes, Ms. Shum was returned to the sitting room. Ms. Shum was told to pretend to watch television and to act normally. At appears defendant Ho may have told Ms. Shum that the boss had lost money in a casino and that they were there to get the money back.

Officer Michael Edward Sylvia and Officer Jack Sturgeon of the Ridgecrest Police Department were assigned to check on the welfare of a girl at 421 West Church Avenue. As the officers approached the house, they heard male voices inside. The officers knocked on the door. Ms. Shum was told to answer the door and warned not to say anything. The officers asked if everything was all right and if anyone who was not supposed to be in the house was there. Ms. Shum told

them Louisa was fine. However, it appears the officers realized something was wrong and entered the house.

Defendant Dao was standing behind Ms. Shum and defendant Yung and defendant Ho were on the couch. Officer Sylvia entered the bedroom and found Ms. Ling and Louisa bound with duct tape on the bed. Officer Sylvia then drew his gun and noticed petitioner partially concealed in the bed. Officer Sylvia took petitioner into the hall and turned him over to Officer Sturgeon. A gun was found under the pillow on the bed.

Police found United States currency, Hong Kong currency, and jewelry, all of which belonged to the victims, on petitioner and defendant Yung.

Ms. Ling informed the police that the cook who worked at her restaurant and also lived at the house had lost approximately $10,000 gambling in Los Angeles. Ms. Ling appears to have initially believed that the cook was somehow involved in the robbery. However, Ms. Ling testified that she did not believe the cook was involved, but did state that the cook had moved out of the house the same day as the robbery.

Detective Douglas Allen Plumhoff spoke with petitioner soon after the robbery, and petitioner gave a taped statement that was played for the jury. In his statement, petitioner admitted being in the residence. Petitioner said that he had entered the house through a window. Petitioner admitted that he had brought a woman who had come to the front door into the house. However, petitioner stated that he had not possessed a gun and had not bound any of the people.

Defense

Petitioner testified on his own behalf. Petitioner stated that he had been in Los Angeles with his father. Petitioner testified that defendant Dao was his girlfriend. Petitioner and defendant Dao had gone bowling with her friend, defendant Ho, on December 15, 1991. At the bowling alley, the group met defendant Yung, who petitioner testified he had not previously known. Defendant Yung was talking about going to Ridgecrest and also about going to Las Vegas. In the early morning, the group decided to go to Las Vegas and got into a car defendant Yung was driving.

Petitioner testified that he had fallen asleep soon after they began driving and when he awoke they were in Ridgecrest. Petitioner testified that defendant Yung dropped him and defendant Dao off at a Denny's Restaurant while defendant Yung went off to see a friend. After the group rejoined, they went to a motel where they spent the night.

Petitioner testified that the next day the group drove around Ridgecrest. Defendant Yung stopped the car at a house. Defendant Yung went into the house with a key. Petitioner and the others remained in the car for nine to twelve minutes, until defendant Yung told them to come into the house.

Petitioner testified that he went into the house and watched television. While petitioner was watching television, defendant Yung walked around the house. Petitioner claimed that he did not see anyone else in the house. Petitioner admitted that a woman came to the door, yelled, and spoke to them in Chinese, a language

petitioner does not understand. However, petitioner testified that it was defendant Yung who chased her outside and brought her into the house. Petitioner testified that he did not understand what was going on.

After Louisa came into the house and was taken into the bedroom by defendant Yung, petitioner went into the bedroom. Petitioner testified that he saw defendant Yung sitting in a chair and saw two women and a girl tied on the bed. Petitioner testified that he realized for the first time that defendant Yung had a gun. Petitioner claimed that he did not know what to do. It was around this time that the police entered the house.

Petitioner testified that the statement he gave to the police after his arrest was not true. Petitioner claimed that he had only said what defendant Yung had told him to say.

DISCUSSION

Because the unexhausted claims have been removed from the petition, the only claim currently before the Court is whether there was sufficient evidence to support petitioner's conviction for kidnaping to commit robbery.[3] To determine whether a conviction violates the Constitution because of insufficient evidence, a federal court on writ of habeas corpus review must determine

---

[3] Respondent addressed the merits of the insufficiency of the evidence claim in the answer. Petitioner responded to respondent's arguments in the traverse. Thus no additional briefing of this claim is necessary, and it is ready to be decided on the merits.

whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 320-21, 99 S.Ct. 2781, 2788-89, 2790 (1979); *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1993) (en banc). All evidence must be considered in the light that is the most favorable to the prosecution. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2788-89; *Jones*, 114 F.3d at 1008; *Payne*, 982 F.2d at 338. Respect must be given for the trier of fact's responsibility to resolve conflicting testimony, weigh evidence, and draw reasonable inferences from the facts. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789; *Jones*, 114 F.3d at 1008. Despite what a federal court may believe, the court may not re-decide the case and determine whether it is convinced that the evidence established petitioner's guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2788-89; *Payne*, 982 F.2d at 338. Finally, the court must base its determination of sufficiency of the evidence from an independent review of the record. *Jones*, 982 F.2d at 338.

California Penal Code § 209(b) punishes "any person who kidnaps or carries away any individual to commit robbery." Section 209 requires movement of the victim that is not merely incidental to the commission of the robbery. *People v. Rayford*, 9 Cal. 4th 1, 12, (1994); *In re Earley*, 14 Cal.3d 122, 127-28 (1975); *People v. Daniels*, 71 Cal.2d 1119, 1139 (1969). In addition, the movement must substantially increase the risk of harm to the victim above that normally present in the crime of robbery alone. *Rayford*, 9 Cal.4th at 12; *In re Earley*, 14 Cal.3d at 127-28; *Daniels*, 71 Cal.2d at 1139. In considering whether the asportation of a victim substantially increased the risk of

harm, the Court must consider the decreased likelihood of detection resulting from the movement, the victim's foreseeable attempts to escape, and the defendant's enhanced opportunity to commit additional crimes. *Rayford*, 9 Cal.4th at 13; *People v. Lara*, 12 Cal.3d 903, 908 (1974).

Petitioner was convicted of kidnaping Ms. Ling for the purpose of robbery. When Ms. Ling arrived at the house, she had difficulty opening the door.[4] After Ms. Ling finally got the door open, she observed strangers in her house and petitioner holding a gun. Upon seeing petitioner with a gun, Ms. Ling turned and began to run into the front yard. Ms. Ling took three or four steps and then fell. Petitioner pursued Ms. Ling and captured her when she fell. Petitioner ordered Ms. Ling into the house. He dragged Ms. Ling back into the house by pulling her hair and using a gun. Petitioner contends that this movement, by law, is insufficient to support his conviction.

Petitioner relies on cases where the California courts have found that kidnaping under California Penal Code § 207 requires movement of a victim that is more than trivial, slight, or insignificant and have implied that the movement must be significant. *See People v. Green*, 27 Cal.3d 1, 66 (1980); *People v. Caudillo*, 21 Cal.3d 562, 572 (1978). Petitioner, however, was convicted of kidnaping to commit robbery in violation of California Penal Code § 209, not section 207 kidnaping. The movement

---

[4] Ms. Ling's testimony concerning the kidnaping is found at pages 309-314 in the Reporter's Transcript on Appeal.

requirement for section 209 kidnaping is satisfied by movement that is not incidental to the robbery. *Rayford*, 9 Cal. 4th at 12; *see also People v. Stanworth*, 11 Cal.3d 588, 599 (1974) (finding section 209 requirements not applicable to section 207).[5] The California courts have stated that if a victim is moved a substantial distance, the movement is not incidental to the robbery. *See, e.g., In re Earley*, 14 Cal.3d at 130; *People v. Gonzales*, 21 Cal.App.4th 1648, 1654 (1994). However, the California Supreme Court has never found that a substantial movement of the victim is mandatory, and in fact, has found that no specific distance is required. *Rayford*, 9 Cal.4th at 12; *Daniels*, 71 Cal.2d at 1128. The "context of the

---

[5] Currently, it appears there is some debate in the California courts over what factors the court should consider when determining if the defendant's movement of the victim meets the requirement of section 207 kidnaping. Some courts have found that the actual distance the victim was moved is the only factor. *Caudillo*, 21 Cal.3d at 574. Other courts, however, have found that the increased risk of harm, the boundaries traversed, and other factors are important. *People v. Bradley*, 15 Cal.App.4th 1144, 1153 (1993); *People v. Williams*, 220 Cal.App.3d 1162, 1171 (1990); *see also, Rayford*, 9 Cal.4th at 20 n.10, (describing different standards used to determine whether kidnaping under section 207 occurred, but declining to address differences because standard under section 209 was at issue.) It appears the issue of whether actual distance is the only factor to consider in kidnaping is currently before the California Supreme Court. *See People v. Martinez*, 56 Cal.App.4th 1268, *review granted*, 68 Cal.Rptr.2d 474 (1997); *People v. Allen*, 55 Cal.App.4th 943, *review granted*, 67 Cal.Rptr.2d 514 (1997). However, petitioner was convicted of kidnaping under section 209. There is no dispute over what factors should be considered when determining whether there was sufficient evidence for a section 209 kidnaping.

environment in which the movement occurred is important." *Rayford*, 9 Cal.4th at 12.

The California courts have found that movement within a house or building to complete a robbery is not sufficient movement or risk to meet the requirements of section 209 kidnapping to commit robbery. *See Daniels*, 71 Cal.3d at 1140. Thus, if petitioner had simply moved Ms. Ling around the house, petitioner's argument might have merit. However, petitioner dragged Ms. Ling from where she fell in the front yard into the house. This movement was more than just movement within the house to facilitate the robbery.

The California courts have found that the defendant's moving a victim from outside, where the victim was in the public's view, into a house or apartment building, where the victim was secluded, is not incidental to the robbery. *See People v. Ellis*, 15 Cal.App.3d 66, 72-73 (1971); *People v. Thomas*, 3 Cal.App.3d 853, 865 (1970). While the asportation of Ms. Ling from the front yard into the house facilitated the robbery, the movement was not inconsequential nor a trivial change of location that "had no bearing on the evil at hand." *See Ellis*, 15 Cal.App.3d at 73.

Moving Ms. Ling from an area where she was in the public's view into the seclusion of the house also increased the harm Ms. Ling was placed in. *See People v. Hill*, 20 Cal.App.3d 1049, 1052-53 (1971); *Ellis*, 15 Cal.App.3d at 72-73; *Thomas*, 3 Cal.App.3d at 865. The risk of harm to Ms. Ling was far less as long as she remained in the front yard where others may have been watching. *See Ellis*, 15 Cal.App.3d at 73. By taking Ms.

Ling into the house, petitioner was enabled to accomplish his goal with less probability of apprehension. *See Ellis*, 15 Cal.App.3d at 73; *Thomas*, 3 Cal.App.3d at 866. In addition, moving Ms. Ling into the house made it possible for petitioner to commit other crimes against Ms. Ling. *See Rayford*, 9 Cal.4th at 13-14. Finally, Ms. Ling's risk of harm was increased by petitioner moving her, even a short distance, while petitioner had a gun. *See Lara*, 12 Cal.3d at 908. The fact Ms. Ling's actual injuries were slight does not negate the increased danger she was placed in. *See Lara*, 12 Cal.3d at 908.

From the facts of this case, a rational trier of fact could have concluded that petitioner's asportation of Ms. Ling from the front yard into the house was not merely incidental to the robbery and substantially increased her risk of harm. Thus, there was sufficient evidence for a reasonable jury to have found the essential elements of kidnaping for the purpose of robbery.

RECOMMENDATION

Accordingly, for the reasons stated above, the Court recommends that the petition for writ of habeas corpus be DENIED on the merits.

This report and recommendation is submitted to the Honorable Anthony W. Ishii, United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document

should be captioned "Objections to Magistrate Judge's Report and Recommendations." Replies to the objections shall be served and filed within ten (10) *court* days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Aalst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: Nov. 20, 1998

/s/ Sandra M. Snyder
SANDRA M. SNYDER
UNITED STATES
MAGISTRATE JUDGE